United States Department of Labor
Employees' Compensation Appeals Board

F.F., Appellant	)	
and	)	**Docket No. 20-1542**
	)	**Issued: April 9, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Wilkes-Barre, PA, Employer	)	

Appearances:
Michael S. Melnick, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 20, 2020 appellant, through counsel, filed a timely appeal from a February 25, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[2] As more than 180 days has elapsed from OWCP's last merit decision, dated July 19, 2019, to the filing of

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id*.; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, counsel asserted that oral argument should be granted because his original claim file was mismanaged and that OWCP's decision should, therefore, be reversed. The Board, in exercising its discretion, denies appellant's request for oral argument because the Board does not have jurisdiction over the merits of appellant's case and his arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

this appeal, pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 24, 2018 appellant, then a 56-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he aggravated a previous left knee injury due to factors of his federal employment.[4] He noted that he first became aware of his condition and first realized it was caused or aggravated by his federal employment on March 16, 2017. Appellant explained that on March 16, 2017 he was delivering mail while hiking through snow caused by a recent snow storm. As he was hiking through deep snow, he experienced pain in his left knee. Appellant noted that he sought treatment with Dr. William Krywicki, a Board-certified orthopedic surgeon, who informed him that he aggravated his previous left knee injury by hiking through the deep snow. He stopped work on March 16, 2017.

In a February 13, 2018 letter, Dr. Krywicki recounted his history of treatment for appellant's left knee in relation to the January 3, 2015 employment incident when he slipped on ice and twisted his knee while delivering mail. He subsequently evaluated appellant on May 9, 2017, relating that appellant informed him that he had been experiencing more pain in his left knee since "March 15 or March 16, 2017." Appellant explained to Dr. Krywicki that, after a large snow storm, he was required to wear boots and walk differently through the snow in order to deliver his mail. By March 25, 2017 he was unable to perform his daily activities or continue his work. Upon evaluation and review of x-ray scans, Dr. Krywicki noted significant arthritic changes with medial wear in both knees, with at least 80 percent joint narrowing of the joint space in the left knee. He observed that the left knee demonstrated the beginnings of a lateral subluxation of the tibia of the left side. Dr. Krywicki diagnosed stage III arthritic progression, with the left knee more symptomatic because of the lateral subluxation or shifting of the tibia. He administered a steroid injection to both of appellant's knees to treat his associated symptoms and opined that appellant's left knee condition was a direct progression of the January 3, 2015 traumatic injury. Dr. Krywicki explained that he previously had a ligament injury and that his stage III arthritic changes of the left knee were caused by the added stress of walking through a snow pack which created stresses and torsions to his left knee.

In an undated statement, appellant recounted the events of the January 3, 2015 employment incident in which he slipped while carrying mail in the performance of duty and injured his left knee. He explained that on March 16, 2017 he aggravated his left knee by walking through deep snow on his mail route. Appellant noted that he was first instructed to file a recurrence claim but

[3] 5 U.S.C. § 8101 *et seq.*

[4] On January 9, 2015 appellant filed a traumatic injury claim (Form CA-1) for a January 3, 2015 left knee injury in which he slipped and twisted his knee on a resident's steps while delivering mail in icy conditions. On March 7, 2016 OWCP accepted his claim for a cystic meniscus, posterior horn of medial meniscus, left knee and a sprain of the lateral collateral ligament of the left knee under OWCP File No. xxxxxx234. It has not administratively combined the claims.

OWCP denied his claim. He detailed his employment duties as a letter carrier and offered that he was subjected to excessive walking through all weather conditions and multiple hazards. Appellant specifically described the conditions after a blizzard on March 16, 2017 and stated that he had to wear additional clothing and walk with a different motion in order to deliver his mail. His left knee began to hurt about mid route and gradually worsened.

OWCP, in an October 30 2018 development letter, advised appellant of the factual and medical deficiencies of his claim. It asked him to complete a questionnaire to provide further details regarding the circumstances of his claimed injury and requested a narrative medical report from his treating physician, which contained a detailed description of findings and diagnoses, explaining how his work activities caused, contributed to, or aggravated his medical conditions. OWCP afforded appellant 30 days to respond.

In response to OWCP's questionnaire, appellant submitted a November 16, 2018 statement wherein he provided that, according to OWCP's definition of the injury, his claim was a traumatic injury and not an occupational disease claim. He clarified that he did not initially wait two months to seek medical treatment for his left knee injury and that he initially contacted Dr. Krywicki on March 19, 2017. Dr. Krywicki instructed appellant to use rest and ice on his knee for a week and, if his symptoms did not improve, to schedule an appointment. After waiting a week, his next available appointment was on May 9, 2017. Appellant also provided that he initially reported his injury to his supervisor on the day of the March 16, 2017 employment injury.

In a November 29, 2018 letter, the employing establishment controverted appellant's claim, providing that in a recurrence claim (Form CA-2a) for his left knee injury in OWCP File No. xxxxxx234 he stated that he experienced pain in his left knee as the result of walking on March 8, 2017 and that he made no statement about his March 16, 2017 injury. It further provided that on his current Form CA-2 he indicated that he first became aware of his injury on March 16, 2017 and made no mention of the pain he experienced on March 8, 2017. The employing establishment expressed that the only reason appellant was filing the claim was to be compensated because his recurrence claim was denied by OWCP on June 26, 2018. It noted that in Dr. Krywicki's February 13, 2018 letter he reported that appellant had not been seen by anyone else to his knowledge and also that appellant indicated in his recurrence claim that he was seen by Dr. Diane Ciaglia, Board-certified in family medicine, on March 21, 2017. The employing establishment argued that this discrepancy casts doubt on whether appellant's physician was aware of the complete medical history of his condition. It reasoned that, since his January 3, 2015 injury, appellant had only worked approximately 20.30 hours per week on average and therefore Dr. Krywicki's rationale that the partial instability in his knee was aggravated by his work was not accurate.

By decision dated December 3, 2018, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish the factual component of fact of injury. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive evidence. Appellant submitted an October 4, 2018 medical report in which Dr. Kevin Kuhn, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), evaluated appellant's left knee in relation to OWCP File No. xxxxxx234 regarding necessity of a left knee arthroplasty. Dr. Kuhn reviewed a statement of accepted facts (SOAF) and the medical evidence of record, including a May 9, 2017 clinical note which provided

that appellant sustained an injury over two days getting in and out of his truck. He observed that he had difficulty putting his full weight on his left leg and going up and down stairs since that time. Dr. Kuhn opined that a proposed left knee replacement surgery was causally related to the January 3, 2015 employment injury and explained that there was a temporal relationship between the date of the injury and appellant's request for left knee replacement surgery. He continued by relating that he had persistent symptoms since the date of his injury and that there was a lack of evidence of preexistent symptoms leading up to the January 3, 2015 employment injury. Dr. Kuhn concluded that the medical evidence was sufficient to demonstrate that the surgical procedure was medically necessary and concurred with Dr. Krywicki's assessment of causation provided in a May 9, 2018 medical report.

On January 2, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a March 21, 2017 medical report, appellant informed Dr. Ciaglia that he was favoring a knee while walking in the snow and that he thought it could have been arthritis. On evaluation, Dr. Ciaglia diagnosed pain in an unspecified knee.

Dr. Krywicki, in a December 10, 2018 letter, again recounted his history of medical treatment for appellant's left knee in relation to his January 3, 2015 injury and subsequent March 16, 2017 employment incidents. Upon review of his May 9, 2017 x-ray scans and physical evaluation, Dr. Krywicki noted arthritic progression at stage III or early stage IV and stated that the left knee was more symptomatic because of a lateral shift or subluxation that occurred to the tibia. He opined, within a reasonable degree of medical certainty, that his findings of arthritic wear were a direct progression of appellant's January 3, 2015 employment injury. Dr. Krywicki noted that a February 27, 2015 magnetic resonance imaging (MRI) scan of appellant's left knee showed significant articular surface full-thickness damage and explained that the narrowing occurred in appellant's knee because of the progression of arthritic findings and the breakdown of the macerated meniscus. He continued by offering that appellant was able to navigate on dry surfaces, but walking through the snow on March 16, 2017 caused him to change his walking pattern and created a torsional motion that aggravated his arthritis.

In a May 2, 2019 letter, Dr. Krywicki cited a 2006 article which provided that degenerative meniscus tears increase the risk of progressive arthritis in the knee over a two and a half year period and described the symptomology that went along with degenerative arthritis in the knee. He explained that appellant's February 2015 MRI scan demonstrated a complex tear with significant cartilage involved and that the article thereby provided the correct information on the natural progressive history in individuals with that sort of pathology. Dr. Krywicki also attached a copy of the 2006 article.

An oral hearing was held before a representative of OWCP's Branch of Hearings and Review on May 7, 2019. Counsel recounted the timeline of appellant's March 16, 2017 injury as well as his subsequent medical treatment by Drs. Ciaglia and Krywicki. He described Dr. Krywicki's finding and the medical articles he cited to and provided that the evidence was sufficient to establish that appellant's arthritis was aggravate by the March 16, 2017 employment incident. Appellant stated that he underwent a left knee arthroplasty surgery on October 31, 2018. Counsel clarified that appellant's claim was for a traumatic injury and not an occupational disease.

Appellant submitted a November 7, 2018 operative report in which Dr. Krywicki performed a left total knee replacement procedure to treat appellant's degenerative arthritis of the left knee.

In a May 23, 2019 letter, Dr. Krywicki opined that the aggravation of appellant's degenerative left knee arthritis related to the findings in his MRI scan showing a complex tear of his medial meniscus and articular surface damage to the femoral condyle and tibial surface related to his January 3, 2015 employment injury. He continued by offering that appellant's left knee was injured further during the March 16, 2017 employment incident. Dr. Krywicki noted that, after his six-month follow-up appointment for his left knee replacement, appellant was prepared to return to work and perform light-duty assignments. He concluded by stating that appellant's disability from March 16, 2017 through April 30, 2019 was the direct and expected progression of arthritis in his left knee related to the January 3, 2015 employment injury.

In a June 4, 2019 letter, the employing establishment again controverted appellant's claim, arguing that appellant's statements during the oral hearing contradicted some of his earlier statements and medical evidence and attached a timeline of appellant's work schedule during the time of the alleged March 16, 2017 employment injury.

By decision July 19, 2019, OWCP's hearing representative converted appellant's claim to a traumatic injury claim and affirmed the December 3, 2018 decision, finding that there were sufficient inconsistencies in the evidence to cast serious doubt on the validity of appellant's claim.

On November 25, 2019 appellant, through counsel, requested reconsideration of OWCP's July 19, 2019 decision. In an attached statement, appellant contended that the hearing representative's statement that he did not reference his March 16, 2017 injury during his March 21, 2017 medical appointment with Dr. Ciaglia was incorrect and cited language where Dr. Ciaglia noted "knee pain flareups, has difficulty ambulating." He further contended that he was initially told by his supervisor to file his claim as a recurrence of his previous injury and that he accidentally entered the wrong date for his recurrence claim, which created confusion. Appellant asserted further that his March 21, 2017 doctor's appointment was related to his diabetes and that his supervisor had misinterpreted the medical report. He clarified that he did not wait until May 9, 2017 to seek treatment for his injury, as he called Dr. Krywicki who suggested that he apply ice and rest to treat his injury and to later follow up if his symptoms continued. The next scheduled appointment appellant could obtain with him was on May 9, 2017. In response to not being able to obtain an earlier appointment with Dr. Krywicki, appellant informed Dr. Cialgia of his injury on March 21, 2017.

In a January 29, 2016 statement, appellant described the January 3, 2015 employment injury, his symptoms, medical treatment and the impact his injury had on his activities of daily living (ADLs).

Dr. Krywicki suggested in a February 15, 2018 medical note that the date in which appellant would be able to return to work was uncertain as he was preparing to undergo a left knee replacement surgery.

In a January 10, 2020 letter, the employing establishment controverted appellant's claim, stating that his use of March 8, 2017 as the date of injury was not a singular mistake and that he did not mention walking through the snow on his recurrence claim form. It also argued that

Dr. Krywicki's medical opinion was based on an inaccurate depiction of the facts. The employing establishment also attached a copy of appellant's April 17, 2017 Form CA-2a.

In response to the employing establishment's January 10, 2020 letter, appellant submitted a February 7, 2020 statement in which he provided under oath that the date used on his Form CA-2a was used in error and that he was given no guidance or assistance in filing his claim. He asserted that the employing establishment ignored his statements about the weather being the reason he used a sick day the day before the alleged March 16, 2017 injury and that the snow on the ground was the reason he aggravated his left knee.

By decision dated February 25, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.[5]

To require OWCP to reopen a case for merit review, pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[6]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[7] If it chooses to grant reconsideration, it reopens and reviews the case on its merits.[8] If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[9]

[5] 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

[6] 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[7] *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of the merit decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

[8] *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

[9] *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On reconsideration, appellant submitted a February 7, 2020 statement in which he responded to the employing establishment's January 10, 2020 letter controverting his claim and provided clarifying statements in order to demonstrate that his injury occurred on March 16, 2017, as alleged. As such, this statement constitutes relevant and pertinent new evidence with regard to the threshold issue of whether he sustained a traumatic injury in the performance of duty on March 16, 2017, as alleged. Therefore, the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b).[10]

As appellant has advanced new and relevant evidence, he is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.[11]

Further, OWCP's procedures provide that cases should be administratively combined when correct adjudication of the issues depends on frequent cross-referencing between case files.[12] For example, if a new injury case is reported for an employee who previously filed an injury claim for a similar condition or the same part of the body, doubling is required.[13] Appellant previously filed a traumatic injury claim on January 9, 2015 alleging a left knee injury due to a January 3, 2015 employment injury under OWCP File No. xxxxxx234. On March 7, 2016 OWCP accepted his claim for a cystic meniscus, posterior horn of medial meniscus, left knee and a sprain of the lateral collateral ligament of the left knee. Additionally, Dr. Krywicki's medical evidence consistently opines that the alleged March 16, 2017 employment incident aggravated appellant's previous left knee injury related to the January 3, 2015 employment injury. The medical records of OWCP File No. xxxxxx234, however, have not been administratively combined for cross-referencing as required by OWCP procedures. For a full and fair adjudication, the Board finds that this case shall also be remanded to OWCP to administratively combine the present claim file with OWCP File No. xxxxxx234. Following this and other such further development as deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

[10] *See C.H.*, Docket No. 17-1065 (issued December 14, 2017); *J.W.*, Docket No. 18-0822 (issued July 1, 2020); *D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

[11] *J.T.*, Docket No. 19-1829 (issued August 21, 2020); *T.P.*, Docket No. 18-0608 (issued August 2, 2018). *See L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8c (February 2000); *R.R.*, Docket No. 19-0368 (issued November 26, 2019).

[13] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 9, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board